No. 90-1282 (3)

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

REHAB AMER and AHMED AMER,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Michigan procedure for termination of parental rights comports with due process and federal statutory requirements.

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JURISDICTION

The judgment of the Michigan Court of Appeals was entered on June 12, 1990. The Michigan Supreme Court thereafter denied leave to appeal on July 31, 1990 and reconsideration on September 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

1972 PA 59:

> Sec. 19a. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:
>
> (a) The child has been deserted and abandoned without provision for identification for a period of at least 6 months and the public or private agency having temporary custody of the child has made a reasonable attempt to locate the parent.
>
> (b) The child is left with intent of desertion and abandonment by his parent or guardian in the care of

another person without provision for his support or without communication for a period of at least 6 months. The failure to provide support or to communicate for a period of at least 6 months shall be presumptive evidence of the parent's intent to abandon the child. If, in the opinion of the court, the evidence indicates that the parent or guardian has not made regular and substantial efforts to support or communicate with the child, the court may declare the child deserted and abandoned by his parent or guardian.

(c) A parent or guardian of the child is unable to provide proper care and custody for a period in excess of 2 years because of a mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child.

(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

(e) The parent or guardian is unable to provide a fit home for the child by reason of neglect.

(f) The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least 2 years and upon rehearing the parents fail to establish a reasonable probability that they will be able to reestablish a proper home for the child within the following 12 months.

This act is ordered to take immediate effect.
Approved February 21, 1972.

Michigan Court Rule 5.974(A) (adopted and amended effective January 1, 1988; now 5.974(A)(2)(3)):

(A) General.

(1) Termination of parental rights over a child requires that a statutory basis for termination be established and that termination is in the best interest of the child. Both steps may be accomplished at a single hearing.

(2) The burden of proof is on the party seeking by court order to terminate the rights of the respondent over the child. There is no right to a jury determination.

Michigan Court Rule 5.974(E) (adopted and amended effective January 1, 1988; now 5.974(F)):

(E) Termination of Parental Rights Under MCL 712A.19a; MSA 27.3178 (598.19a). If the parental rights of

> the respondent over the child are not terminated at the initial dispositional hearing, and the child is in foster care in the temporary custody of the court, the court may take action on a supplemental petition that seeks to terminate the parental rights of respondent over the child, but only if the allegations are based on one or more grounds listed in MCL 712A.19a [now MCL 712A.19b] ... .
>
> * * *
>
> (3) Standard of Proof. Except as provided in MCR 5.980, the proofs must be clear and convincing that one or more grounds exist under MCL 712A.19a; [now MCL 712A.19b(3)...], to warrant severing the parent-child relationship. ...

STATEMENT OF THE CASE

This is a termination of parental rights case. The action commenced on April 2, 1984 when Respondent filed a petition with the juvenile division of the Wayne County Probate Court which alleged abuse of Samier Amer (date of birth: November 18, 1983). Samier was

made a temporary ward of the court after a hearing which found no medical explanation for multiple fractures of different ages to the child's arms, legs and collarbone. Report and Recommendation of Referee dated September 4, 1984, Pet. App. 113-118. The court approved placement of Samier with his maternal grandmother and directed parental counseling and participation in parenting classes. Report and Recommendation of Referee dated November 26, 1984. The court permitted extended visitation in the family home after a review hearing on October 18, 1985. Samier died on November 22, 1985.

Samier's death prompted the immediate placement of his siblings Suehier Ahmed (twin sister) and Mohammed Ali (date of

birth: December 11, 1982) in emergency foster care.[1] A temporary custody hearing with regard to these children was held on September 10, October 24 and 28, 1986. After a review of the testimony presented at the hearing by Petitioners, various emergency personnel, attending physicians and the pathologist, the court concluded that Samier's death was not accidental and that Petitioners were

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[1]An amended petition as to these children had been previously filed on July 16, 1984.

responsible.[2] Tr. 10/28/86, pp 382-392; see Pet. App. 90-105. The court specifically commented on the credibility of Petitioner Rehab to the effect that she "orchestrate[d] what would sound best to the Court, as opposed to what really happened." Tr. 10/28/86, p 391; Pet. App. 102.

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[2]The medical examiner's report dated November 23, 1985, stated that Samier: "... died of blunt injuries to the head causing stellate fracture of the skull over the back of the head (subdural hematoma) and contusions of the brain. There was one impact to the back of the head. The pattern of injuries indicated that the head was moving at a great velocity and struck a fixed object."

At the hearing, the pathologist explained that the point of impact was on the back of the head and that the contusion to the brain was on the opposite side of the impact. Tr. 9/10/86, p 75. This was inconsistent with a bathtub slip and fall as claimed by Petitioners. Tr. 9/10/86, pp 76-78. This view was shared by the treating physician, the director of Intensive Care Unit at Children's Hospital of Michigan. Tr. 9/10/86, pp 113-116, 119-120.

Petitioners' third child, Zinabe Ahmed, was born on December 9, 1986. By order of December 15, 1986, the Court approved continuing foster care placement for all three children with therapy designed to reunite the family.

The opinion of the Court of Appeals summarizes the results as follows:

> "In subsequent proceedings, medical personnel who evaluated the parents testified to their belief that therapy that failed to deal with Samier's death would not prove helpful in rehabilitating the family. The parents would not admit to the abuse and it was felt that they had to address this issue before the other children could be safely returned to the family home.
>
> "On December 16, 1987, the Department of Social Services filed a petition requesting the permanent termination of the respondents' rights to their children in part because they had refused to accept responsibility for the nonaccidental death of Samier. During the dispositional hearing, the medical personnel repeated their belief that the respondents needed to acknowledge the

> child abuse before there could be a meaningful change in their parenting behavior. The medical experts were convinced that a repeat of what occurred to Samier was possible. Furthermore, the parents' inability to deal with the abuse after years of therapy indicated that the family was untreatable. Denial had become fixed. Nothing more could be done for the family and a permanent solution was in the best interests of the children. The probate court found this testimony persuasive and on January 9, 1989, entered its order terminating the parental rights of Rehab and Ahmed Amer. Opinion, p 4; Pet. App. 8-9.

The Probate Court entered an order on January 9, 1989 which terminated Petitioner's parental rights and committed the children to the Michigan Children's Institute. The Michigan Court of Appeals affirmed the lower court's decision in an unpublished per curiam opinion dated June 12, 1990 (Docket No. 114910); Pet. App. 2-16. The Michigan Supreme Court denied leave to appeal by order entered

July 31, 1990 (Docket No. 89463); Pet. App. 124-125. A motion for reconsideration was denied by the Supreme Court on September 28, 1990; Pet. App. 126.

REASONS FOR DENYING THE WRIT

I

THE PROBATE COURT UTILIZED THE PROPER STANDARD OF PROOF.

The proceedings below which resulted in termination of Petitioners' parental rights were fully consistent with this Court's decision in Santosky v Kramer, 455 US 745 (1982). Santosky adopted a "clear and convincing evidence" standard of proof for such adjudications in order to strike a fair balance between the rights of the parents and the legitimate concerns of the state. 455 US at 769. Michigan law incorporates this standard

in parental rights termination cases. Mich. Court Rule, 1985 5.974(A)(2) and (E)(3); In the Matter of LaFlure, 48 Mich App 377, 388; 210 NW2d 482 (1973); In the Matter of Atkins, 112 Mich App 528, 540-541; 316 NW2d 477 (1982). This burden applies to the substantive statutory grounds which justify a permanent custody order. In re Bedwell, 160 Mich App 168; 408 NW2d 65 (1987) (discussing application of standard to termination under former Mich. Comp. Laws 712A.19a).[3] Once the above standard is met, the probate court exercises discretionary

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[3]This statute applied where the child was in foster care under court jurisdiction and supervision. This parental rights termination provision which is at issue in this case (1972 PA 59) was amended and substantially rewritten by 1988 PA 224 (eff. April 1, 1989) and is now set forth in Mich. Comp. Laws 712A.19b.

authority to consider the best interest of the child. Mich. Court Rule, 1985 5.974(A)(1); In re Tedder, 150 Mich App 688; 389 NW2d 149 (1986); In the Matter of Schejbal, 131 Mich App 833, 836; 346 NW2d 597 (1984) [best interest of child alone can not justify termination under § 19a].

Petitioners here appear to acknowledge that Michigan law requires the agency to establish grounds for termination by clear and convincing evidence. Petition, p 28. They argue instead that the "statutory scheme" and the proceedings in this case effectively undermined

these requirements.[4] The Petition presents several interrelated claims in this regard which, for purposes of this response, may be addressed as follows.

Effect of Temporary Foster Care Determination.

In accordance with the philosophy that efforts to reunite the family should proceed permanent termination of parental rights, In re Mathers, 371 Mich 516; 124 NW2d 828 (1963), Michigan law allows the Probate Court to assume jurisdiction of a child and direct placement in temporary

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[4]The statutory terms have been construed by Michigan courts. In re Gentry, 142 Mich App 701; 369 NW2d 889 (1985); In the Matter of Bidwell, 129 Mich App 499; 342 NW2d 82 (1983). The terms are sufficiently definite for due process purposes. See Grayned v City of Rockford, 408 US 104, 108-109 (1972); Wainwright v Stone, 414 US 21, 23 (1983).

foster care when a preponderance of the evidence shows one of the grounds set forth in Mich. Comp. Laws 712A.2(b); In the Matter of Riffe, 147 Mich App 658, 669-670; 382 NW2d 842 (1985). The objective of the statutory scheme at this "jurisdictional phase" is "to protect children from an unfit home environment and to preserve the existence of the family unit if ... at all possible". In re Jacobs, 433 Mich 24, 37; 444 NW2d 789 (1989).

There is nothing in Santosky which suggests the constitutional necessity of a stricter standard of proof at this stage. If anything, insistence on an elevated standard for temporary custody could well operate to defeat the ameliorative goals of assisting recovery of the

family unit by casting the state in the role of parental adversary instead of helpful intervenor. See Krause v Catholic Community Services, 47 Wash App 734; 737 P2d 280, 283 (1987).

In this case, applicable statutory provisions required court review of temporary wardship every six months, 1966 PA 182, § 19.[5] Parental rights are subject to termination where the parents fail to reestablish a proper home or at least the likelihood of a proper home in the forseeable future. 1972 PA 59, § 19a.[6]

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[5]1988 PA 224 (effective April 1, 1989) now provides for review hearings every ninety-one (91) days during the first year of wardship. Mich. Comp. Laws 712A.19(3).

[6]This section was revised by 1988 PA 224 (eff. April 1, 1989) and is now contained in Mich. Comp. Laws 712A.19(b)(c)(i)(ii).

In LaFlure, 48 Mich App at 386, the Michigan Court of Appeals rejected the notion, which Petitioners contend operated here, that the same standard of proof which supported temporary wardship also justified termination of parental rights. Instead, the court held that "parental rights may not be terminated unless the state proves by clear and convincing evidence that such termination is warranted." Id. LaFlure explained that the statutory scheme simply placed the burden of going forward with the evidence, as opposed to the burden of persuasion (proof), on the parents and that the effect of such a rebuttal presumption was minimal because "[i]t merely requires the parents to give any indication whatsoever that the family situation has improved." 48 Mich App at

388 (emphasis added). See also In re Miller, 433 Mich 331; 445 NW2d 161 (1989) [prima facie case established by two years of custody on neglect petition].

Contrary to Petitioners' assertions, this is not a case where the trial court applied an incorrect standard of proof or relied exclusively on prior determinations. Here the court considered extensive testimony from a number of live witnesses in addition to exhibits and records. Transcript of Permanent Custody Hearing, Volume 16, p 1714 (hereinafter Tr (Volume number), p __). See Pet. App. 16-47. The court found that Petitioners could not provide a fit home for the children given "that the experiential acceptance of responsibility has failed in the past, and there is no reason to

believe it's going to work in the future." Tr 16, p 1733, Pet. App. 43-44. The court noted that three and a half years of effort had "gained very little" and that "[t]here's been absolutely no indication that if the court were to continue this matter into the future that there would be change." Id. The court thus found "that there is clear and convincing evidence that subparagraphs (e) and (f) of MCLA 712A.19a have been established." Id. at 1734. Pet. App. 44-45.

Under state law the court could properly consider evidence adduced at prior hearings, LaFlure, 48 Mich App at 391. In this regard, abuse of one child is probative of a parent's proclivity to abuse other children and may justify

change in custody. Matter of Marshall, 159 Mich App 683; 406 NW2d 913 (1987); In re Anderson, 155 Mich App 615; 400 NW2d 330 (1986). Consideration of such evidence does not represent adoption of an unconstitutional standard of proof or a shift in the burden of persuasion.[7]

In these circumstances, neither the statutory scheme or proceedings in this case employed irrebuttable presumptions in the termination of Petitioners' parental rights. Irrebuttable or conclusive presumptions are substantive in nature and foreclose the person against whom they are involved from demonstrating in a

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[7]The acquittal of Petitioner Rehab on criminal charges in Samier's death is not entitled to collateral estoppel effect in these civil proceedings. United States v One Assortment of 89 Firearms, 465 US 354 (1984).

particular proceeding "that applying the presumption ... will in fact not further the lawful governmental policy the presumption is designed to effectuate." Cleveland Board of Education v LaFleur, 414 US 632 (1974). Mandatory rebuttable presumptions are procedural devices which permit proof of one fact to establish another unless the party against whom the presumption operates can persuade the trier of fact not to make such findings. Francis v Franklin, 471 US 307, 317 (1985). See Ulster County Court v Allen, 442 US 140, 167 (1979) (mandatory presumptions are impermissible in a criminal case unless "the fact proved is sufficient to support the inference of guilty beyond a reasonable doubt). The above are significantly different from the burden of production at issue in this

case. The latter does not implicate constitutional concerns.

Petitioners' real argument in this case is that the probate court's decision was incorrect. The application of the appropriate standard of proof to a discrete set of facts, however, does not present an important constitutional question which this court should review.

Fifth Amendment

Petitioners contend that the probate court required them to "confess" to child abuse as a prerequisite to family reunification. This condition, Petitioners argue, violated their Fifth Amendment privilege against self-incrimination.

Both Petitioners voluntarily testified at various hearings in this matter

and participated in court-ordered counseling without assertion of a Fifth Amendment claim. The Court of Appeals below found that a failure to raise this issue at the trial court level waived appellate review. Opinion, p 6. Pet. App. 14-15. This procedural bar represents an adequate and independent state ground under the "plain statement" rule of Michigan v Long, 463 US 1032 (1983), to preclude review by this court.

In any event, Petitioners claim does not present a substantial federal question. Petitioners' actual complaint is that the trial court refused to accept their explanations for the obvious abuses suffered by Samier. The record, however, demonstrates an ample basis for the trial court's conclusions in this regard.

The focus of the court in this context was not an extraction of inculpatory statements from Petitioners, but instead sought some assurance that abusive behavior patterns had altered sufficiently to permit return of Petitioners' other children. In Matter of J.W. and A.W., 415 NW2d 879 (Minn, 1987), the Minnesota Supreme Court discussed the effect of a parent's failure to accept responsibility for abuse of a child in relation to Fifth Amendment protections:

> "What the parents would like to claim, although of course they cannot, is that their responsibility for the death of a child and the inferences arising therefrom is privileged and may not be considered in determining their suitability as parents. Admittedly, the parents are confronted with a dilemma, but it is not a dilemma that triggers the Fifth Amendment to the extent the parents would wish. In the lexicon of the Fifth Amendment, the risk of losing the children for failure to undergo meaningful therapy is neither a 'threat' nor a 'penalty' imposed by

> the state. It is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent. Supra at 883-884 (footnotes omitted)."

A requirement that parents acknowledge and rectify deficiencies which pose a threat to their children as evidenced by prior abusive behavior does not condition one constitutional right (maintenance of the family unit) on forfeiture of another (self-incrimination). It is instead simply the necessary expression of the state's right and obligation to protect children at risk. Termination in such a situation is thus not a sanction for the exercise of a constitutional right, but the logical result of a failure to correct parental deficiencies. See In Interest of H.R.K., 433 NW2d 46, 50 (Iowa App, 1988).

In Baltimore City Department of Social Services v Bouknight, 493 US ___; 110 S Ct 900 (1990), this Court held that a custodial parent could not invoke the Fifth Amendment privilege to resist a court order to produce the child. The court stated that in such a noncriminal setting "[t]he possibility that a production order will compel testimonial assertions that may prove incriminatory does not, in all contexts, justify invoking the privilege ...", 110 S Ct at 905. The decision emphasized that state's noncriminal regulatory interest in the care and safety of children in need of assistance. 110 S Ct at 907. Finally, the Court noted various limitations on the use of any incriminatory statements in subsequent criminal proceedings.

The state in the present case did not seek testimonial admissions for use in subsequent criminal proceedings, but instead sought cooperation and progress in necessary therapy. As to Petitioner Rehab, her acquittal of criminal charges effectively eliminated any possible subsequent use of statements made in this regard. Petitioner Ahmed would have retained Fifth amendment and, possibly state law privilege, protections from use of any incriminating statements made over his objection in subsequent criminal actions.

In these circumstances, Petitioners have failed to present an important constitutional claim for review by this Court.[8]

II

COMPLIANCE WITH FEDERAL STATUTES.

Petitioners contend that efforts to reunite the family in this case did not comply with federal law. Petition, p 29. Petitioners cite no authority for the proposition that any such alleged noncompliance affects the validity of an otherwise lawful termination order.

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[8]Petitioners' equal protection argument (Pet. p 24, n. 5) is without merit in that special treatment of Native American families through enhanced proof requirements is rationally related to a unique federal policy. See Morton v Mancari, 417 US 535, 555 (1974).

Essentially, Petitioners' argument is that the probate court should have adopted a different treatment modality than the one utilized in this case.

During the foster care period, the Petitioners were provided with regular weekly visitation, weekly meetings with social workers and quarterly conferences with all parties to discuss progress and problems in the case. The Petitioners were also referred to Parents Anonymous and to a therapist for psychological counseling. The children received supervision in the foster home and the oldest child was provided with individual therapy (Tr 9, pp 933-941). In addition to providing services to the family, the agencies prepared periodic case plans. Tr 5, pp 353-360, 364, 371, 376, 379.

The approach taken by both services and plans were towards resolving the problems and conditions which resulted in the childrens' removal from the home. Tr 9, pp 933, 939. The above efforts to reunite the family were both reasonable and appropriate under the circumstances of this case.

Petitioners' claim in this regard does not present an important question for review by this Court.

III

JUDICIAL BIAS.

Petitioners' conclusorily allege judicial bias based on remarks and orders during the course of proceedings in this case.

This claim was raised for the first time on appeal to the Michigan Court of

Appeals. There was no objection or motion to disqualify based on bias raised below. Petitioners, in fact, had requested reassignment of this case to the presiding judge. Tr 16, p 1722.

For an alleged bias and prejudice to be disqualifying, it must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. United States v Grinnell Corp, 384 US 563, 583 (1966).

Petitioners' claim in this regard is meritless.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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